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State of Connecticut

HOUSE OF REPRESENTATIVES
STATE CAPITOL
HARTFORD, CONNECTICUT 06106-1591

REPRESENTATIVE BILL AMAN
FOURTEENTH ASSEMBLY DISTRICT

LEGISLATIVE OFFICE BUILDING, ROOM 4200
300 CAPITOL AVENUE
HARTFORD, CT 06106-1591

HOME: (860) 528-3564
CAPITOL: (860) 240-8700
Bill.Aman@cga.ct.gov

ASSISTANT LEADER

RANKING MEMBER
PLANNING AND DEVELOPMENT COMMITTEE

MEMBER
APPROPRIATIONS COMMITTEE
GENERAL LAW COMMITTEE
JUDICIARY COMMITTEE

Monday, February 23, 2015

Transportation Committee
Public Hearing Testimony on HB 5640: An Act Concerning the Taking of Facilities by the Commissioner of Transportation (TRA)

Dear Senator Andrew Maynard, Representative Antonio Guerra, Senator Toni Boucher, Representative Tom O'Dea, and members of the Transportation Committee,

My name is Bill Aman and I represent the 14th District which includes most of South Windsor. I am here today to testify on HB 5640: An Act Concerning the Taking of Facilities by the Commissioner of Transportation (TRA). I believe this action is necessary because of the Department of Transportation (DOT) interpretation of Connecticut's eminent domain statute.

Section 13b-36(a) of the Connecticut Statutes reads, "The commissioner may purchase or take and, in the name of the state, may acquire title in fee simple to, or any lesser estate, interest or right in, any land, buildings, equipment or facilities which the commissioner finds necessary for the operation or improvement of transportation services."

The issue came to my attention when a South Windsor bus company lost its certificate to transport passengers between various towns in eastern Connecticut and Hartford. The DOT decided that it could consider the certificate under the term "facilities," and therefore it was subject to the eminent domain statute. The DOT Notice of Condemnation says condemnation "is found to be necessary for the improvement of transportation services. Any rights under said certificate are hereby taken." The Commissioner determined that the certificate has no value

and assessed damages at one dollar. Others will testify regarding the impact this confiscation will have on the bus companies and I'm sure the DOT will be here to explain why they want to do this.

The Transportation Committee and the legislature as a whole need to define the word "facilities" to mean tangible assets that are directly related to the land that is being taken by eminent domain. It is my opinion that the legislative intent of the law was that property owners would be paid for items such as agricultural crops, tennis courts, docks, golf greens, etc. that would not be considered a building or equipment. It is my opinion that under the DOT's interpretation, it can cancel any contract or take anything it wants from a citizen via the eminent domain statute.

The impact of the interpretation of the word "facilities" is extremely important. What I would like the committee members to consider is how expanding the word facilities can mean that any government entity (state, municipal, or other) can take anything it wants, leaving only the question of how much, if anything, they will have to pay for it. What impact will this have on the citizens of Connecticut? I find this expansion of government powers via the eminent domain statute scary.

Attached to my testimony are two columns by Jon Lender of the Hartford Courant: *A New Legal Weapon for State DOT: Condemnation of Intangible Property* and *Senator Seeks to Ban DOT's Seizure of Intangible Property Under Eminent Domain."* Also attached is the March 26, 2014 letter from the State of Connecticut Department of Transportation, which explains that the DOT is taking the action to "facilitate the final service plan and management contracting for the opening of CTfastrak."

A New Legal Weapon For State DOT: Condemnation of 'Intangible Property'

Jon Lender
HARTFORD COURANT
jlender@courant.com

JANUARY 2, 2015, 11:54 AM

The state Department of Transportation has expanded the definition of what it can seize via eminent domain. It long has condemned land – or other property that you can touch or see – to make way for public roads. But now it's also condemning what a judge recently called "intangible property."

How is that possible?

Well, the DOT has condemned four private bus companies' long standing rights to carry passengers over certain routes, one of which is the same path between New Britain and Hartford to be served by state's controversial new "busway" (formally named CTfastrak) slated to begin service in March.

DOT Commissioner James P. Redeker said the condemnation of the "certificates of public convenience and necessity" isn't related to the busway or its viability. He said it's a continuation of an effort dating back five years to put the companies' commuter routes out to competitive bidding, because such bidding wasn't done decades ago when the companies obtained their certificates under a non-competitive, "ancient" state regulatory system.

The bus companies say the quality of their service has never been questioned and they claim – unsuccessfully, so far – that the state shouldn't be able to seize by eminent domain the certificates that have given them the right to their routes all these years.

However it turns out – and it may end up with the state Supreme Court – the case constitutes a new chapter in Connecticut's eventful history of eminent domain. That history includes the New London v. Kelo case in which the U.S. Supreme Court in 2005 narrowly upheld the use of eminent domain to transfer land from one private owner to another for the sake of economic development.

The Kelo decision gained national notoriety and was branded by critics as an abuse of government authority.

But the state's new move to condemn "intangible property" has gone unnoticed until now, as it's been quietly contested in Hartford Superior Court by lawyers for the state and private bus operators.

The transportation department, represented by the office of Attorney General George Jepsen, last month persuaded a judge to approve its condemnation of the certificates held by Collias Bus Service Inc., Datteo Inc., Nason Partners Inc., and the New Britain Transportation Co. for routes mostly between Hartford and towns to the east and west.

On Dec. 4, Judge Trial Referee Joseph A. Shortall issued a ruling upholding the DOT's seizure of the certificates – finding that they fall within one of the categories of things that can be condemned by the government under Connecticut's eminent domain statutes: "land, building, equipment and facilities."

Shortall agreed with the DOT's claims that the definition of "facilities" is flexible enough to include a private company's right to run buses along a certain route. The companies have argued that the government can only condemn "tangible property" such as land and buildings, and not, as described by Shortall, "intangible property like the rights they have [to run buses along specified routes] by virtue of their certificates."

The four bus companies have appealed the ruling by Shortall, who's reached the mandatory judges' retirement age of 70 but still has authority to hear cases as a trial judge referee. The companies filed with the state Appellate Court – but because of its precedent-setting potential, they have asked that it go directly to the state Supreme Court.

The case is a complicated one – not just legally, but also politically because the $570-million busway plan already has many detractors who say it's too expensive and impractical. The new condemnations add the potential criticism that it is hurting private, family-owned bus companies.

"I believe the state does not have the power to take away these certificates which have been in existence" for decades, said the bus companies lawyer, Jeffrey J. Mirman. He said that state law provides administrative procedures by which a bus company's certificate can be removed "for cause" – and he said there's no cause for revocation.

"They're all family-owned companies and these people want to continue in the business of providing bus service," Mirman said. "The state should encourage private enterprise and the state shouldn't be in the business of providing services that private companies have been and continue to provide profitably."

Redeker said that the state owns the buses that the companies operate and heavily subsidizes the commuter routes. He said the DOT has a good working relationship with the companies under existing contracts with them, adding that all he's trying to do is accomplish what was begun by the DOT during the Rell administration: bring competition to the routes to obtain "the best service at the best cost." The idea is to reduce the subsidy paid by taxpayers for the commuter service, Redeker said.

The companies – particularly Datteo – would have done well under the bidding system that the state tried to impose in 2010 before the bus operators sued over it. A judge issued an injunction saying that the new competitive-bidding arrangement cannot be implemented during the litigation over it. That injunction has been extended to the present, pending the outcome of the bus companies' appeal.

That means the state's effort to put the companies' bus routes out to competitive bidding can't happen until that appeal is resolved.

Mirman, like Redeker, said he doesn't believe the state's condemnation move is aimed at promoting or protecting the success of the busway. He said it's more about the state wanting to control and coordinate the

companies' bus routes without having to deal with "due process" in removing the firms' long-held legal rights under the certificates.

Busway Is 'Backdrop'

But although both sides say the case doesn't revolve around the busway, it's certainly related to it.

"The busway plays into it because, in our view, the busway covers the routes which are included in Datteo's and New Britain Transportation's certificates," Mirman said. Datteo's certificate covers the actual busway route to Hartford, he said, while New Britain Transportation has some "feeder" service to the busway from nearby towns, Mirman said.

"My view is that the [busway] route is covered by Datteo's certificate, and that Datteo has the exclusive right to operate the busway," Mirman said.

That assertion is starkly different from the state's plan to operate the busway with Connecticut transit buses.

So, obviously, something has to give on that point.

The judge in the case cited the busway as a major consideration, also.

"The backdrop for this controversy is the state's construction of what is commonly referred to as the 'busway,' a roadway devoted to express bus service between Hartford and New Britain," Shortall wrote in his Dec. 4 decision.

He said that the companies claim that "the busway incorporates many of the routes over which the companies hold the exclusive right to provide bus service, pursuant to their certificates," Shortall wrote. "Thus, the department's plans for the busway infringe on the exclusive rights the companies enjoy under their certificates."

However, Shortall said DOT can condemn the certificates based on past court cases – including a 1942 federal appeals court decision involving a dispute between the Hartford Electric Light Co. and the Federal Power Commission. In that case, the court said that "the word 'facilities' is generally regarded as a widely inclusive term, embracing everything which aids or makes easier the performance of the activities involved in the business of a person or corporation."

Shortall also said Merriam-Webster's Third International Dictionary defines "facility" as "something that makes an action, operation or course of conduct easier."

"The certificates held by the companies undisputedly fit this definition," Shortall wrote. "Not only do they make the companies' activities in operating a bus service easier; they are essential to those operations."

However, Mirman said his research of the word "facilities" in Connecticut statutes shows that it is used to describe tangible things you can see and touch, not "intangible" things such as the bus operators' rights to their bus routes.

If the bus companies lose their appeal, it means the seizure of their certificates will be upheld, and then the normal procedure in a condemnation of property would be carried out at the Superior Court level: a judge would decide, after arguments from both sides, what the state has to pay the companies for what it took.

Redeker said he recognizes that such compensation is part of the system of eminent domain. Neither he nor Mirman as willing to speculate on how many millions of dollars that might amount to.

Mirman said he doubted any of the companies would go out of business if the state prevails, because they also run charter buses and provide other services.

However, Mirman added that while the state says it wants to seize the certificates in order to get the best price for the best service, "that doesn't give them the right to circumvent the law." The law that established the "certificates of convenience and necessity" goes back a century, Mirman said, and in all the time since "the legislature hasn't seen fit to change it."

Senator Seeks To Ban DOT's Seizure Of 'Intangible Property' Under Eminent Domain

By Jon Lender

FEBRUARY 4, 2015, 5:25 AM

A state senator wants to ban the Connecticut Department of Transportation's new practice of using its power of eminent domain to seize "intangible property," such as bus companies' licenses to carry passengers on specified routes.

Sen. Joe Markley, R-Southington, says he's "alarmed" that the DOT has expanded the definition of what it can seize through under the state's eminent domain law beyond the traditional power of condemning of land and buildings to make way for road construction.

He's introduced a bill "to limit the state's power of eminent domain to the taking of tangible real property" – and to "specify that such power does not extend to the taking of licenses or permits."

"This radical expansion of eminent domain threatens every business person and property-holder in Connecticut," Markley said.

In a phone interview Tuesday, Markley said he was "thunderstruck" when he read a Jan. 4 Government Watch column in The Courant that said the DOT has expanded its use of eminent domain beyond its usual taking of property you can see or touch, such as land and buildings.

The DOT has seized four private bus companies' long-standing rights to carry passengers over certain routes. The companies hold those rights under licenses – called "certificates of public convenience and necessity" – which were issued by the state decades ago.

One of the routes in question follows the same path between New Britain and Hartford to be served by state's controversial new "busway" -- formally named CTfastrak -- slated to begin service in March.

Markley, a leading critic of the $570-million busway, said he believes the project is a reason that the DOT has expanded its use of eminent domain. "The DOT is sequestering the contracts of four private bus companies that own the right to operate bus routes that would compete with the New Britain to Hartford Busway," he said.

DOT officials say that their condemnation efforts are unrelated to the busway.

State law says that the government can use eminent domain to seize, "land, buildings, equipment and facilities" – and a Superior Court judge found in December that the definition of "facilities" is flexible enough to include "intangible property" such as a private company's certificate to run buses on a certain route.

On the basis of that definition, the court upheld the DOT's condemnation of the certificates held by Collins Bus Service Inc., Datteo Inc., Nason Partners Inc. and the New Britain Transportation Co. for routes mostly between Hartford and towns to the east and west.

The four companies are appealing that decision. Markley's bill would narrow the definition of "facilities" by specifying that it does not include "licenses or permits" such as the bus companies certificates.

The bus companies' lawyer, Jeffrey J. Mirman, has said that a bus company's certificate can only be removed under state law "for cause" -- and there's no cause for revocation. The companies continue to argue that, contrary to the judge's recent ruling, the eminent domain statutes only empower the government to condemn "tangible property" such as land and buildings.

Markley agreed. "The DOT's action and the ruling set a terrible precedent," Markley said. "If the license to operate a bus route can be considered a facility, what else qualifies? Any contract might likewise be termed a facility, or any intellectual property, including a patent. No one can say where such an expansion of government might end.

"This ruling has already violated the rights of four private bus companies, but more importantly, it threatens every citizen's right to be secure in his or her possessions. Every now and then, government does something that really scares me, by opening the door to extensive, long-term unintended consequences. This redefinition of eminent domain is a frightfully bad idea."

DOT Commissioner James P. Redeker has said that the condemnation of the bus companies' certificates isn't related to the busway or its viability. Instead, he said, it's a continuation of a DOT effort dating back five years to put the companies' commuter routes out to competitive bidding. He said such bidding wasn't done decades ago when the companies obtained their certificates under a noncompetitive state regulatory system that he called "ancient."

Redeker said that the state owns the buses that the companies operate, and it heavily subsidizes the commuter routes. He said the DOT has a good working relationship with the companies under existing contracts, and all he's trying to do is accomplish what was begun by the DOT during the Rell administration: bring competition to the routes to obtain "the best service at the best cost."

A DOT spokesman said Tuesday that the agency had nothing to add to Redeker's previous comments on the issue.

The controversy adds to Connecticut's eventful history of eminent domain – a history that includes the New London v. Kelo case in which the U.S. Supreme Court in 2005 upheld the use of eminent domain to transfer land from one private owner to another for the sake of economic development. The Kelo decision gained national notoriety and was branded by critics as an abuse of government authority.

Asked what he thinks his bill's prospects are in the Democrat-controlled General Assembly, Markley said, "the more people that see the story and understand the implications of this decision," the more they may favor the bill.

"Civil liberties are one of those issues that cut unpredictably. My hope would be that clear- thinking people across the political spectrum might look at this and say that is not the intent of eminent domain," he said. "It's almost certain to have consequences we don't like. Why not address it now before it leads to some terrible mistakes being made?"

HHD-CV14-5037654-S

Collins Bus Service, Inc. c/o Harold J.A. Collins 1105 Strong Road South Windsor, Connecticut 06074	)	SUPERIOR COURT JUDICIAL DISTRICT OF HARTFORD September 4, 2014

AMENDED NOTICE OF CONDEMNATION

AND ASSESSMENT OF DAMAGES

Pursuant to the provisions of Sections 13b-34 and 13b-36 of the General Statutes of Connecticut, as revised, the Commissioner of Transportation of the State of Connecticut hereby finds that the State's acquisition of any and all rights in Certificate of Public Convenience and Necessity No. 466 for the Operation of Intrastate Motor Bus Service, as amended from time to time, and issued pursuant to Section 16-309 of the General Statutes of Connecticut, presently under authority of Section 13b-80 of the General Statutes of Connecticut, as amended from time to time, is found to be necessary for the operation and improvement of transportation services, and any rights under said Certificate are hereby taken, and notice thereof is hereby filed with the Clerk of the Superior Court in the Judicial District of Hartford in which said Certificate is located.

The Certificate of Public Convenience and Necessity No. 466 is on record in the name of Harold J.A. Collins doing business as Collins Bus Lines, and now claimed to be owned by Collins Bus Service, Inc., a Connecticut corporation having an office in the Town of South Windsor, County of Hartford and State of Connecticut.

The purpose of this amendment to the Notice of Condemnation and Assessment of Damages filed on March 26, 2014, is to reference the Commissioner of Transportation's authority under the Connecticut General Statutes, Section 13b-34.

The Commissioner finds the Certificate has no value and Damages are assessed at $1.00.

James Redeker
Commissioner of Transportation
State of Connecticut

_____(L.S.)
Duly Authorized